

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 26 2007

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

BROCK WAKEFIELD,

Plaintiff - Appellee,
Cross-Appellant

v.

CITY OF ESCONDIDO; et al.,

Defendants,

and

AL PARKER,

Defendant - Appellant.
Cross-Appellee

Nos. 05-56769 & 05-56809

D.C. No. CV-03-01094-MLH/JMA

MEMORANDUM^{*}

Appeal from the United States District Court
for the Southern District of California
Marilyn L. Huff, District Judge, Presiding

Argued and Submitted July 12, 2007
Pasadena, California

Before: SILVERMAN, W. FLETCHER, and CLIFTON, Circuit Judges.

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

In this 42 U.S.C. § 1983 action, Defendant Al Parker appeals from a judgment and jury verdict holding him liable for excessive force, a post-trial order denying him qualified immunity, and an evidentiary ruling the district court made during trial. We affirm the matters raised by Parker’s appeal. Plaintiff Brock Wakefield cross-appeals from an order granting Parker judgment as a matter of law on his punitive damages claim. We reverse that order, and remand.

Parker first argues that there was insufficient evidence to support the jury’s finding that he had used excessive force against Wakefield. We disagree. When analyzing an excessive force claim under Graham v. Connor, 490 U.S. 386 (1989), the dispositive question is whether an officer’s use of force against a plaintiff was “objectively reasonable under the circumstances.” See Smith v. City of Hemet, 394 F.3d 689, 701 (9th Cir. 2005) (en banc). When viewed in the light most favorable to Wakefield, evidence at trial supported the conclusion that Parker denied Wakefield’s initial request to get up and then administered two taser shots against Wakefield while Wakefield – the victim of a rear-end collision – was unarmed, outnumbered, at least partially restrained, visibly suffering from claustrophobia, and pleading with Parker not to shoot him. These facts suffice to sustain the jury verdict. In addition, it is of no help to Parker that the jury declined to find liability

for excessive force against his co-defendant, another officer who merely struggled with Wakefield and struck his wrists while attempting to handcuff him.

Parker next argues that the district court erred in denying his post-trial motion for qualified immunity. There was no error. This circuit has made clear that when “‘the defendant[’s] conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts’ that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established.” Deorle v. Rutherford, 272 F.3d 1272, 1286 (9th Cir. 2001) (quoting Mendoza v. Block, 27 F.3d 1357, 1361 (9th Cir. 1994)) (alteration in Deorle). As discussed above, when viewed in the light most favorable to Wakefield, evidence at trial showed that Parker repeatedly and without warning deployed taser shots against an unarmed individual who was partially restrained, who had committed no serious offense, who was in the throes of a claustrophobic attack, and who pleaded with Parker not to shoot him. See Drummond v. City of Anaheim, 343 F.3d 1052, 1057 (9th Cir. 2003). Under those facts, “closely analogous pre-existing case law” is not required to put Parker on notice that his conduct was unlawful.

Lastly, Parker argues that the district court committed reversible error when it permitted Wakefield’s counsel to question him about earlier incidences of

alleged taser gun deaths during cross-examination. We disagree. It was appropriate for counsel to examine Parker regarding his awareness of reports which, accurately or not, linked taser gun use with deaths, particularly given Parker's prior testimony on direct examination. Moreover, the challenged line of questioning was short, and Parker's counsel had ample opportunity to counter any adverse effects potentially brought about by the questioning through re-direct examination.

In his cross-appeal, Wakefield argues that the district court erred in granting Parker judgment as a matter of law on his punitive damages claim. See Fed. R. Civ. P. 50(b). We agree. A defendant is entitled to judgment as a matter of law only if the evidence and its inferences, "considered as a whole and viewed in the light most favorable to plaintiff[], can reasonably support a defense verdict only." Ward v. City of San Jose, 967 F.2d 280, 286 (9th Cir. 1992). The district court failed to apply this standard, and instead, focused on evidence favorable to the defense that a fact-finder was not obligated to believe. When the proper standard is applied, a fact-finder could reasonably conclude that Parker's use of force demonstrated a "reckless or callous indifference" to Wakefield's federally-protected rights. See Smith v. Wade, 461 U.S. 30, 56 (1983). Accordingly, we reverse the district court's dismissal of Wakefield's punitive damages claim, and remand for further proceedings.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.